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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of the Local Competition)
Provisions of the Telecommunications Act)
of 1996)
)
Interconnection between Local Exchange)
Carriers and Commercial Mobile Radio)
Service Providers)

CC Docket No. 96-98

CC Docket No. 95-185

PETITION FOR RECONSIDERATION

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), by its attorneys, respectfully requests that the Commission reconsider and clarify its decision in the above-captioned proceeding¹ with respect to nonrecurring charges potentially applicable to the purchase of unbundled loops.

INTRODUCTION

McLeodUSA applauds the procompetitive stance embodied in the Commission's *UNE Remand Order*. One matter requires clarification by the Commission, however, in order to close a "loophole" used by some RBOCs to limit the ability of CLECs to provide service using UNEs, and unbundled loops in particular. That loophole is embodied in the nonrecurring charge which some RBOCs have attempted to apply to make an unbundled loop available to competitors when the customer in question is served by Integrated Digital Loop Carrier (IDLC).

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

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List A B C D E

The purpose of the Commission's TELRIC rules is to provide for a forward-looking cost methodology which will embody the most currently available network technology, and require purchasers of unbundled network elements to pay prices for those elements based on the forward-looking costs. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, para. 679 (1996) ("*Local Competition Order*"). In this case, the purchaser of an unbundled loop is already paying, as part of the rate for the loop, for the functionality included in the forward-looking technology upon which the TELRIC study is based. It is inconsistent with this framework to allow RBOCs to impose additional charges to make existing plant (which is likely to contain a different mix of technology than that included in the TELRIC technology assumptions) capable of being "unbundled"; and the Commission should clarify its ruling to specifically state that RBOCs may not impose additional charges on purchasers of unbundled network elements to achieve functionality which is already included in the technology assumptions of the TELRIC network.

DISCUSSION

I. TELRIC-Based Prices for Unbundled Loops Compensate the RBOC for the Costs of Providing Loops based on TELRIC Technology Assumptions.

The Commission adopted a TELRIC pricing methodology in order to provide the correct economic signals to both incumbents and new entrants.² The essence of this methodology was to calculate costs using existing wire center locations as a "given", but

deploying latest technology within the constraints of those physical wire center locations.³ This TELRIC decision was a deliberate compromise between a “traditional” embedded-cost methodology, and a strict forward-looking methodology which would calculate the costs of an entirely new and optimized network.⁴ The Commission was clear, however, that the TELRIC methodology it was adopting did not include an “embedded cost” element; and in fact, “embedded (or historical) costs” were specifically listed as a cost that “must not be included in a TELRIC analysis.”⁵

Even more clearly, the Commission rejected the argument that RBOCs should be allowed to recover an amount associated with the cost of their embedded networks in addition to the TELRIC prices that would be set for UNEs:

We are not persuaded by incumbent LEC arguments that prices for interconnection and unbundled network elements must or should include any difference between the embedded costs they have incurred to provide those elements and their current economic costs. Neither a methodology that establishes the prices for interconnection and access to network elements directly on the costs reflected in the regulated books of account, nor a price based on forward looking costs plus an additional amount reflecting embedded costs, would be consistent with the approach we are adopting.

Local Competition Order, Para. 705. Thus, it is abundantly clear that the framework established by the Commission is founded upon the simple premise that prices for UNEs are to be based on forward-looking costs determined based on the most efficient forward-

² See *Local Competition Order*, Para. 672 (“We believe that the prices that potential entrants pay for these elements should reflect forward-looking costs in order to encourage efficient levels of investment and entry.”)

³ *Id.* at Para. 685. (“We, therefore, conclude that the forward-looking pricing methodology for interconnection and unbundled network elements should be based on costs that assume that wire centers will be placed at the incumbent LEC’s current wire center locations, but that the reconstructed local network will employ the most efficient technology for reasonably foreseeable capacity requirements.”)

⁴ *Id.* at Para. 683-85.

⁵ *Id.* at Para. 673.

looking technology and existing wire center locations; and that these TELRIC prices are to be full compensation to RBOCs for supplying the network elements in question.

II. Requiring Compensation in Addition to the TELRIC Price for Unbundled Loops May Result in Unnecessary Recovery from Unbundled Loop Purchasers.

Despite this straightforward framework, some RBOCs from which McLeodUSA purchases unbundled network elements claim the right to levy “special construction charges” when certain unbundled loops are purchased. Typically, these loops are provided by Integrated Digital Loop Carrier (IDLC).⁶ When McLeodUSA requests an unbundled loop to a customer who is served by IDLC, service may be shifted to an available copper pair, or the “dis-integration” of the digital facility may be required through the deployment of a remote or central office terminal to allow an unbundled loop to be provided. In either case, RBOCs have required that McLeodUSA pay special construction charges—sometimes amounting to tens of thousands of dollars—before an unbundled loop will be provided.

It is important to note that these loops are not “conditioned” for data services in any way, nor are they for the provisioning of advanced services. Instead, these are the basic, standard loops needed to provide voice-grade service to both business and residential customers. In short, these are precisely the loops which the Commission concluded were necessary in order to bring competition to local telecommunications markets. *UNE Remand Order*, para. 181.

⁶ The difference between IDLC and non-integrated carrier systems is relevant here. IDLC, an older pair-gain technology, does not include deployment of a central office terminal before the digital pair gain facility is connected to the RBOC switch. Non-integrated digital loop carrier systems include a central office terminal which can be used to provide an unbundled loop from the digital carrier system.

The effect of such construction charges on the ability of a CLEC to provide competitive services is obvious. Prevailing local exchange rates for business and residence service is in the range of \$15-\$60 per month. If a CLEC must pay several thousand dollars in “up front” charges to obtain an unbundled loop to one of these customers—in addition to all the normal recurring charges for the loop—it becomes economically infeasible to provide competitive services. In effect, competition for these customers is foreclosed.⁷

The market segment involved is not insignificant. In some markets, as many as 15% of unbundled loop orders submitted by McLeodUSA have been subjected to such special construction charges. Moreover, as will be discussed below, this is a problem that McLeodUSA expects to become worse in the future. As a result, failure of the Commission to make it clear that such charges are not allowed under TELRIC pricing standards will be a significant impediment to local exchange competition.

This situation might be understandable if the RBOC were not already recovering the costs of providing unbundled loops; but, under the Commission’s TELRIC pricing principles discussed above, this is not the case. TELRIC pricing, as noted above, is based on the deployment of forward-looking technology using existing wire center locations. Because forward-looking technology is used, the digital loop carrier systems typically included in the TELRIC studies are non-integrated systems capable of supporting the provisioning of unbundled loops. Thus, the TELRIC prices that are paid by CLECs for these unbundled loops already include the functionality necessary for unbundling. For an

⁷ Thus, the effect of these special construction charges is precisely the effect that the Commission sought to avoid when it required the unbundling of loops provided over IDLC: they allow an RBOC to “hide” customers from competitors through the use of IDLC technology. *See Local Competition Order*, Para. 383.

RBOC to charge an additional amount, as compensation for the equipment necessary to make its existing embedded plant support unbundled loops, clearly constitutes double-recovery, and runs afoul of the proscription contained in the *Local Competition Order*: That the TELRC rates charged by RBOCs may not include “a price based on forward looking costs plus an additional amount reflecting embedded costs.” *Local Competition Order*, Para. 705.

The need for clarification of the functionality included what is included in the definition of an unbundled loop results from potential ambiguity arising from two sources. First, the Commission’s language allowing the recovery of loop conditioning costs based on “forward looking pricing principles”, found in newly-adopted 47 C.F.R. Section 51.319(a)(3)(B), may be argued by analogy: if additional nonrecurring charges are allowed for loop conditioning, the argument goes, why should similar charges not be allowed for unbundling itself?⁸ The fallacy with this position, however, lies in the failure to correctly consider exactly how “forward looking pricing principles” apply in the context of special construction charges for unbundled loops. If, for example, the forward-looking technology used in the TELRIC pricing study contains no IDLC systems, then the relevant question becomes “What is the forward-looking cost of ‘dis-integrating’ loops in a network which contains no IDLC?” The obvious answer to this question is “Zero.”

⁸ This issue, as it related to conditioning charges,, has been raised in a Petition for Reconsideration filed in this docket by Rythms Netconnections, Inc., and Covad Communications, Inc. McLeodUSA agrees with the arguments set forth in that Petition, and stresses that many of the same arguments which relate to loop conditioning are also relevant to the provisioning of unbundled loops at all. Thus, arguments related to loop conditioning should not be considered in a vacuum.

The second potential area of ambiguity, which is related to the issue discussed above, arises because of certain language contained in the Commission's *Local Competition Order*.⁹ That language can be used to support the argument that additional charges may be appropriate when unbundling loops provided over IDLC. When placed in the context of the entire *Local Competition Order*, however, McLeodUSA believes that the opposite conclusion is what was intended by the Commission.

It is important to remember that the language in Paragraphs 382-384 did not appear in that part of the Commission's order which addressed the pricing for unbundled network elements. Rather, the discussion responded to arguments by RBOCs that they did not need to "unbundle" certain loops (e.g., loops with digital functionality or loops provided over IDLC) at all. The Commission clearly rejected that position, requiring that all loops, regardless of the underlying facilities actually in place, be available to competitors as unbundled loops.

In reaching this conclusion, the Commission also noted that it would be up to competitors who purchase unbundled loops to bear the costs of conditioning loops or separating out unbundled loops from IDLC. It did not, however, specify that "special construction charges" or any sort of "up front" payments were the appropriate payment mechanisms. Thus, the question raised by the language in Paragraphs 382-384 is whether these costs are already being borne by competitors in the rates they are paying to RBOCs for unbundled loops, or are unnecessary because IDLC technology is not even used in the forward-looking TELRIC cost methodology. If the rates that competitors pay for unbundled loops either cover these costs, or cover the costs of a network in which the

⁹ Specifically, at Para. 382, 384.

function is unnecessary, then levying "special construction charges" in addition to those rates is clearly inappropriate.¹⁰

As a result, the argument that failure to levy special construction charges means that its unbundled loop rates would not be cost based is specious. Unbundled loop rates, by definition, cover all the costs of the network functionality embodied in the forward-looking technology used to set those rates.

The fact that such special construction charges are inappropriate can readily be seen in a simple real-world analogy. Suppose Joe wants to lease a new Ford. He goes to his Ford dealer, and makes a deal for a lease at \$400 per month. This lease payment covers the dealer's cost for obtaining and leasing the car for whatever period is involved (that is, it implicitly includes a return of and a return on the dealer's capital). The dealer tells Joe he can pick the car up on Saturday.

Saturday arrives, and Joe goes to the Ford dealer to pick up his car. At that time, the dealer presents Joe with a bill for an additional \$4000, explaining that the only Ford vehicle the dealer had in stock was a 1999 model, and it cost the dealer an additional \$4000 to trade the 1999 Ford for a new Ford. Joe protests, arguing that he had already paid the costs associated with a new Ford. Joe walks away disgusted, ready to look at Chevrolets.

The primary difference between Joe's situation, and the situation faced by a CLEC wishing to buy unbundled loops from an RROC, is the lack of any ability to "walk away" and look for another seller. As the Commission determined in the *UNE Remand*

¹⁰ To the extent that costs are not being recovered but should be, forward-looking TELRIC principles can be applied to determine the amount of the costs and whether recovery by a one-time charge or over time is appropriate.

Order, the availability of such unbundled loops are necessary for the development of effective local exchange competition.¹¹ If the imposition of special construction charges effectively limits the availability of unbundled loops, then CLECs are forced into the choice of either walking away from the customer, or paying for costs which are either duplicated or unnecessary based on the TELRIC unbundled loop rates.

Properly interpreted, the language in Paragraphs 382 and 384 of the *Local Competition Order* is perfectly consistent with the TELRIC costing principles contained in the remainder of the order. This consistency becomes evident when one remembers that it is the states which have the primary role in giving effect to TELRIC pricing, and therefore in defining the forward-looking technologies which will be applied. Thus, if a state adopted a forward-looking methodology which included IDLC as a forward-looking technology, Paragraphs 382 and 384 would allow an additional charge (either recurring or nonrecurring) to unbundle those loops provided over IDLC.¹² In such a case, those charges would be appropriate because the functionality included in the TELRIC price would not include “dis-integrated” digital loop carrier-provided loops.

The clarification requested by McLeodUSA really amounts to nothing more than this: The Commission should make it explicit that the unbundled loop purchased as a UNE at a TELRIC rate includes all the functionality made possible by the forward-looking technology underlying the TELRIC cost study; and that RBOCs may not levy additional charges to achieve that same functionality (i.e., to unbundle the loop).

¹¹ *UNE Remand Order*, Para. 181.

¹² Of course, this charge would still have to meet the forward-looking TELRIC requirements of the Commission’s rules.

III. Requiring Compensation in Addition to the TELRIC Price for Unbundled Loops Provides Incorrect Incentives to RBOCs.

Failure to make the clarification as noted above will do more than delay the development of competition in local exchange markets; it will also send incorrect signals to RBOCs about their network deployment decisions. If RBOCs can levy additional charges on purchasers of unbundled loops provided over IDLC systems, then it will have an incentive to deploy such systems more broadly, even if deployment of alternate systems would make it easier and less expensive to provide unbundled loops to competitors in the future. This clearly is not the incentive that the Commission should be providing to RBOCs. In fact, the Commission already recognized the basis of this problem, by noting that if loops provided over IDLC were not required to be unbundled, it would encourage RBOCs to “hide” loops from competitors through the use of IDLC technology.¹³ RBOCs ought not be allowed to circumvent the Commission’s concern by achieving the same result through the mechanism of “special construction charges.”

Moreover, this is a problem which McLeodUSA expects to become more serious in the future, and therefore the incentives to RBOCs will become stronger to act in a way which deters rather than advances local competition. Currently, one solution sometimes used when an unbundled loop is requested for a customer served by IDLC is to move that customer off the IDLC to a “spare” copper pair. This solution is only available, however, as long as “spare” copper exists. In any given location, as customers are moved from IDLC to spare copper, the existing spare copper loops will be exhausted over time; and once that point is reached, every customer served by IDLC in the area will require

¹³

Local Competition Order, Para. 383.

electronic “dis-integration” of the DLC before an unbundled loop can be provided. Thus, as customers move to competitors providing service using unbundled loops, McLeodUSA expects this “special construction” problem to become worse, and to arise in areas in which it had not previously been an issue because “spare copper” had been available.

IV. The Commission Should Clarify that an Unbundled Loop Purchased at the TELRIC Rate Includes All Functionality Inherent in the Forward-Looking Technology Used to Determine the TELRIC Price.

McLeodUSA believes that the clarification it is requesting is consistent with the intent and with the literal language of both the Commission’s *Local Competition Order* and its *UNE Remand Order*. It is filing this Petition primarily to ensure that the Commission is aware of the practices being followed by some RBOCs, and to present an opportunity to cure a potentially very serious problem at the earliest possible time. In order to accomplish, McLeodUSA requests that the Commission take two complementary actions.

First, the Commission should note that it has always been its intent that, when an RBOC provides unbundled loops pursuant to Section 251, that the functionality availability to the purchaser be the same as the functionality included in the forward-looking technology embodied in the TELRIC cost study used to set the unbundled loop rate. Thus, if a TELRIC cost study includes no IDLC, the unbundled loop rate paid by a purchaser already reflects the cost of a network which contains no IDLC; and additional charges to “dis-integrate” or remove IDLC from the network are inappropriate.

Second, the Commission should add language accomplishing this goal to the rules which define the unbundled loop itself. To accomplish this, McLeodUSA suggests

adding the following language to the introductory paragraph of 47 C.F.R. 51.319(a), just preceding 47 C.F.R. 51.319(a)(1):

Unbundled loops and subloops must include, without additional charge, all functionality and abilities inherent in the forward-looking technology used as the basis for the TELRIC price for the loop or subloop.

By clarifying this requirement in its rules, the Commission can avoid a major obstacle which will otherwise slow the development of local competition.

CONCLUSION

The Commission's order in this case takes a valuable step in making certain that the framework for the development of local exchange competition is in place at the national level. McLeodUSA's Petition for Reconsideration presents an opportunity for the Commission to further advance that goal, by clarifying an area of uncertainty which will otherwise give rise to protracted litigation and cause unnecessary delay in the arrival of competitive services. For these reasons, the Commission should clarify its order in this docket as requested above.

Respectfully Submitted,

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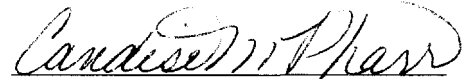
Dated: February 17, 2000

CERTIFICATE OF SERVICE

I, Candise M. Pharr, hereby certify that on the 17th day of February, 2000, I caused copies of the foregoing *Petition For Reconsideration* to be served by hand delivery on the following:

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